Connecticut State Conference Board, Amalgamated Transit Union *and* H.N.S. Management Company, Inc.

Amalgamated Transit Union Local 425 *and* H.N.S. Management Company, Inc.

Amalgamated Transit Union Local 443 *and* H.N.S. Management Company, Inc.

Amalgamated Transit Union Local 281 *and* H.N.S. Management Company, Inc. Cases 34–CB–2506, 34–CB–2507, 34–CB–2508, and 34–CB–2509

July 16, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 3, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondents filed exceptions and a supporting brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Connecticut State Conference Board, Amalgamated Transit Union, East Hartford, Connecticut, Amalgamated Transit Union Local 425, East Hartford, Connecticut, Amalgamated Transit Union Local 443, Stamford, Connecticut, and Amalgamated Transit Union Local 281, New Haven, Connecticut, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Notify H.N.S. Management Company, Inc., that the Respondent Unions will not insist to impasse, as a condition of a new collective-bargaining agreement, on the inclusion of an interest arbitration provision."

3. Substitute the attached notices for those of the administrative law judge.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with H.N.S. Management Company, Inc. (the Employer), by insisting to the point of impasse on the inclusion of an interest arbitration clause in our collective-bargaining agreement with the Employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Employer that we will not insist to impasse, as a condition of a new collective-bargaining agreement, on the inclusion of an interest arbitration provision.

CONNECTICUT STATE CONFERENCE BOARD, AMALGAMATED TRANSIT UNION

[1] We shall modify par. 2(a) of the judge's recommended Order to include the customary affirmative bargaining language used to remedy an unlawful insistence to impasse on the inclusion of an interest arbitration clause in violation of Sec. 8(b)(3). E.g., *Sheet Metal Workers Local 38*, 231 NLRB 699, 702 (1977).

We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

Chairman Battista would not modify the judge's recommended Order. In his opinion, the language of the recommended Order requiring the Respondents to notify the Employer that they are willing to sign the collective-bargaining agreement without the interest arbitration clause, is narrowly tailored to the factual circumstances underlying the violation found and is sufficiently similar to the Board's customary remedial language.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with H.N.S. Management Company, Inc. (the Employer), by insisting to the point of impasse on the inclusion of an interest arbitration clause in our collective-bargaining agreement with the Employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Employer that we will not insist to impasse, as a condition of a new collective-bargaining agreement, on the inclusion of an interest arbitration provision.

AMALGAMATED TRANSIT UNION LOCAL 425

APPENDIX C

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with H.N.S. Management Company, Inc. (the Employer), by insisting to the point of impasse on the inclusion of an interest arbitration clause in our collective-bargaining agreement with the Employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Employer that we will not insist to impasse, as a condition of a new collective-bargaining agreement, on the inclusion of an interest arbitration provision.

AMALGAMATED TRANSIT UNION LOCAL 443

APPENDIX D

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with H.N.S. Management Company, Inc. (the Employer), by insisting to the point of impasse on the inclusion of an interest arbitration clause in our collective-bargaining agreement with the Employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Employer that we will not insist to impasse, as a condition of a new collective-bargaining

agreement, on the inclusion of an interest arbitration provision.

AMALGAMATED TRANSIT UNION LOCAL 281

Terri Craig, Esq., for the General Counsel.
Douglas Taylor, Esq. (Gromfine & Taylor, P.C.), for the Respondent.
Hugh Murray III, Esq. (Murtha Cullina, L.L.P.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. I heard this case on September 12, 2002, in Hartford, Connecticut. The consolidated amended complaint herein, which issued on January 2, 2002, was based upon unfair labor practice charges that were filed on September 6, 2001,[1] by H.N.S. Management Company, Inc. (HNS or the Employer). The amended consolidated complaint alleges that Connecticut State Conference Board, Amalgamated Transit Union (Conference Board), Amalgamated Transit Union Local 425 (Local 425), Amalgamated Transit Union Local 443 (Local 443), and Amalgamated Transit Union Local 281 (Local 281), and collectively referred to herein as the Respondents or the Unions, the collective-bargaining representatives of certain of the Employer's employees, insisted as a condition of reaching a collective-bargaining agreement with the Employer that the Employer agree to the inclusion of an interest arbitration clause in the new agreement, and bargained to impasse in support of this demand, in violation of Section 8(b)(3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Employer manages and operates a public bus transit system in the State of Connecticut, principally in the cities of Hartford, New Haven, and Stamford. The Respondents, while admitting in its answer that during the 12-month period ending October 31, 2001, the Employer derived gross revenues in excess of $250,000, and purchased and received at its various facilities in Connecticut goods valued in excess of $50,000 directly from points outside the State of Connecticut, does not admit the complaint allegation that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Rather, its answer states that it neither admits nor denies this allegation, "but note that the actual Employer is the Department of Transportation of the State of Connecticut." Other than its defense that the State of Connecticut is the actual employer herein because of the financial assistance that it provides to the Employer, counsel for the Respondents entered into a stipulation with counsel for the General Counsel and counsel for the Employer at the hearing that "whichever the actual identity of the employer, all potential employers involved meet the other requisite standards of the Act."

David Lee, the general manager for First Transit, Inc. (First Transit), was the sole witness herein. As he was a totally credible witness, the facts recited herein are based upon his testimony and the documentary evidence introduced by the parties. First Transit has a contract with the Connecticut Department of Transportation (DOT), to operate the local public bus services in the cities of Hartford, New Haven, and Stamford, under the name (CT Transit). Other entities, not related to the Employer, operate bus transit in other cities in Connecticut also under the CT Transit name. First Transit has a contract with a different entity to provide management services to the city of Norwich, Connecticut, but that is not relevant to the issues herein. HNS, a subsidiary of First Transit, was set up to operate the bus services in these cities pursuant to the contract with the DOT. CT Transit or Connecticut Transit is the name recognized by the public for transit systems operating in the State of Connecticut, most of which are operated by HNS. Prior to 1976, the transit system in the three cities involved herein was operated by an entity called the Connecticut Company, a private, for profit, company, that went out of business in 1976. The DOT, with the help of a grant from the Federal Government, acquired the assets of the Connecticut Company and established the name, Connecticut Transit, to be placed on the side of the buses and to be a name that would be recognized by the public. The DOT then hired a company to operate this system and, in 1979, in a competitive bidding process, a predecessor of First Transit was chosen to operate these systems, and has been operating it ever since through HNS.

As part of its agreement with the DOT, HNS provides the services of five senior managers of First Transit: the general manager, Lee, the assistant general manager for transit services, who oversees the bus operation, the dispatching and the bus drivers, the assistant general manager for maintenance, who oversees vehicle and facility maintenance operations, the assistant general manager for administration, who oversees finance, payroll, accounting, human resources and purchasing, and the assistant general manager for planning and marketing. First Transit receives a monthly fee (approximately $70,000 at the present time and increasing to approximately $77,000 at the conclusion of the term of the agreement in March 2006), from the DOT that covers the salaries of the five managers as well as all other services that the Employer provides. The DOT provides the facilities and equipment needed to run the transportation system and maintains ownership of these assets. All bus operators, maintenance employees, clerical employees, and similar employees are employed by the Employer "at the State's expense." The Employer agrees to manage, supervise and run the three transportation systems involved herein and to turn over all revenue received, from the fare box and advertising on the buses, to the State of Connecticut.

When the Employer pays vendors for equipment or supplies, such as bus engines or transmission parts, it pays by checks with the name CT Transit at the top. The same is true for the paychecks to its drivers and mechanics. The money that goes into these checking accounts comes from the DOT. HNS hires, fires, and supervises these employees; the DOT has no role in

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2001.

these actions. Lee is the principal negotiator for the Employer with the Unions; the DOT has no role in these negotiations. HNS also pays for the employees' unemployment insurance, medicare and social security taxes. If the Employer is in need of a new bus, it will be provided by the DOT, primarily from funds received from the Federal Government, and the State retains title to the bus. In addition, the DOT regulates the Employer's routes and services.

On the side of each bus operated by the Employer is a decal: in the middle of the decal is a nine inch high logo of the DOT with the words: "CONNECTICUT DEPARTMENT OF TRANSPORTATION." On the bottom of the decal, in one-inch high letters, are the words: "Operated by HNS Management Company." In addition, the name "CT TRANSIT" is on all sides of the bus in letters about a foot high, and the drivers' uniforms say "CT TRANSIT." Pursuant to petitions filed by Local 425, in 1984 and 1985, the Region issued decisions and directions of elections involving HNS. In addition, the Respondents filed an unfair labor practice charge herein with the Board alleging that the Employer violated Section 8(a)(5) of the Act by insisting on the deletion of section 87.

As stated above, the Respondents, in its answer, admit that during the period of time involved herein, the Employer derived gross revenue in excess of $250,000 and purchased and received in Connecticut goods valued in excess of $50,000 directly from points outside the State of Connecticut. However, its answer also alleges that the "actual Employer" herein is the DOT. As affirmative defenses, the Respondents allege that the Employer provides no financial or physical support for the transportation systems, which operate under the trade name of Connecticut Transit, that the "actual" employer of the bargaining unit employees is the DOT, that the Employer exercises no independent control over any significant aspect of employment of the bargaining unit employees, and that jurisdiction should not be asserted herein because the State of Connecticut is not an employer within the meaning of the Act. In other words, the Respondents appear to be alleging that the employer herein is really the DOT, which is an exempt employer under Section 2(2) of the Act, which exempts, inter alia, the United States, or any wholly owned Government corporation . . . or any State or political subdivision thereof."

In *Concordia Electric Cooperative*, 315 NLRB 752, 753 (1994), the Board stated:

> Section 2(2) of the Act exempts from the Board's jurisdiction, inter alia, "any State or political subdivision thereof . . . ." As noted in *Fayette Electric Cooperative*, 308 NLRB 1071 (1992), the Supreme Court stated in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), that for an entity to be exempt from the Board's jurisdiction as a political subdivision, it must either: (1) have been created directly by a State, so as to constitute an arm or department of the Government; or (2) be administered by individuals who are responsible to public officials or to the general electorate.

It is clear that HNS and First Transit were not created by the State of Connecticut or by the DOT. Rather, a predecessor of the Employer obtained the contract to provide bus transportation in the cities involved through competitive bidding in 1979, and HNS and First Transit have operated these systems since that time pursuant to agreements with the State or the DOT. In addition, Lee and the other managers of the Employer are not responsible to public officials or to the general electorate. Rather, pursuant to its agreement with the DOT, the Employer agrees to operate the public transportation systems in Hartford, New Haven, and Stamford, and agrees to turn over all revenue received to the DOT. The DOT pays a specified monthly sum to the Employer and maintains ownership of the assets used in the transportation system.

In *Res-Care, Inc.*, 280 NLRB 670 (1986), the Board held that in determining whether to assert jurisdiction over an employer with close ties to exempt Governmental entities, it would examine the extent of the control exerted by the exempt entity over essential terms and conditions of employment retained by the employer and the exempt entity in order to determine whether the employer was capable of engaging in meaningful collective bargaining. In *Management Training Corp.*, 317 NLRB 1355 (1995), the Board decided not to follow this test anymore, finding it "unworkable and unrealistic," and decided that in determining whether to assert jurisdiction, "the Board will only consider whether the employer meets the definition of "employer" under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." In *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997), the Court found that the Board's decision in *Management Training* was a permissible exercise of the Board's jurisdiction under the Act.

Unlike *Management Training* and *Teledyne*, which operated job corp facilities pursuant to contracts with the U.S. Department of Labor, and *FiveCAP, Inc.*, 331 NLRB 1165 (2000), a nonprofit corporation engaged in the operation of head start, housing, and other public assistance programs, the Employer herein is engaged in a regular commercial enterprise that receives financial assistance from the State, apparently, because experience has shown that it could not survive economically without such assistance. Neither the State nor the DOT has any control over the Employer outside of the financial assistance provided and the resulting ownership of the Employer's assets. I therefore find that the Employer does not satisfy either of the tests set forth in Natural Gas Utility of Hawkins County, and that the Employer is not a Section 2(2) exempt employer, but, rather is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondents admit, and I find, that the Conference Board, Local 425, Local 443, and Local 281 are each labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

The prior contract between HNS and Locals 281, 425, and 443 was for the period April 1, 1999 through March 31, 2001. section 86 contains the no-strike, no-lockout clause, and section 87 contains an interest arbitration clause, the issue herein. This clause states, inter alia:

> Should written notice terminating either the basic wage scale, or any of these working conditions, or both, be given in accordance with Section 102 hereof, then any difference or differences concerning the basic wage scales or these working conditions, or both, as the case may be, may be submitted to arbitration as provided in the paragraph (a) of this Section, unless an adjustment be made by negotiation between the parties.

Paragraph (a) states that the Employer and the employees shall each select one arbitrator, who shall attempt to settle the differences and, if unsuccessful, shall choose the third arbitrator. Subparagraph (c) states that "the decision of the majority of the Board, submitted in writing to the Company and the Employees, shall be binding upon both parties."

By letter to Lee dated January 15, Alvin Douglas, chairman of the Conference Board, advised the Employer that the Unions wanted to negotiate a new agreement to be effective April 1. The letter stated, inter alia: "Please note that it continues to be the position of this Union that rights and obligations of both parties under section 87 of the current contract are not, and cannot be, affected." By letter dated January 16, Lee wrote to Douglas confirming receipt of his letter. In addition, Lee stated, inter alia:

> Please note that it continues to be the position of the Company that Section 102[2] does not allow either party to selectively terminate some provisions of the contract, while leaving others in force. If other sections of the contract, such as Section 86, cease to be binding on the parties when the contract terminates, the same must hold true for Section 87. In any case, we share your earnest desire to negotiate a mutually agreeable new contract before the current agreement expires.

On February 5, the Conference Board sent the Employer proposed changes for the new contract. The preamble states: "All sections and subsections not affected by these proposals are to continue unchanged." There are about 60 proposed changes; the letter does not refer to section 87. HNS responded with 37 proposals for the new contract, none of which refer to section 87. On February 20, Lee and Douglas signed an agreement allowing HNS, until February 20, to give written notice to terminate the contract, and, by letter dated February 20, Lee notified Douglas of its intention to cancel and terminate the contract effective April 1. In this letter, Lee stated that HNS was canceling and terminating all provisions of the expiring contract, "including but without limitation, Section 87." On February 21, HNS submitted a one-page contract proposal, which included: "Delete Section 87." HNS submitted an eight-page proposal dated March 1. His proposal modified, withdrew, or stood by its prior proposals. It states: "The Company stands on its proposal of February 21, 2001 to delete Section 87." The Unions made a "Comprehensive Counter-proposal" dated March 2. In response to HNS' proposals of the prior day, the Unions accepted many of the proposals, some with a "provided." The letter says: "Any topic not addressed is rejected." Section 87 is not mentioned. The next proposal is from HNS dated March 22 comprising eight pages. This proposal agrees to, withdraws, stands on, or modifies prior proposals. It states: "The Company stands on its proposal of February 21, 2001, to delete Section 87." The Conference Board's counterproposal dated later that same day contains 14 items, none of which refer to section 87.

A three-page document entitled: "Tentative Agreements Through 3/23/01," amends, deletes, adds to, or clarifies contractual provisions. Section 87 is not mentioned therein. The Conference Board's proposal dated March 28 begins by stating: "In addition to those provisions already agreed, the Union proposes the following terms of a 2-year agreement, from April 2, 2001 through midnight, March 31, 2003. It contains about 25 items, none of which refer to section 87.

The Unions' negotiation notes for March 28 states that HNS delivered a typed set of tentative agreements reached earlier and when they reconvened, HNS presented a new comprehensive proposal consisting of six items, including: "continued to insist on deleting Section 87 entirely." The Conference Board's "Final Offer" dated later that day, lists 12 items as "All matters previously agreed to, plus." It does not mention section 87. By letter to Lee dated March 29, Douglas wrote, inter alia:

> As you know, we have been unable to resolve our differences over certain changes proposed by both sides with respect to our collective bargaining agreement. Accordingly, the Connecticut State Conference Board, including Locals 281, 425, and 443 of the Amalgamated Transit Union hereby submits all disputed issues to binding arbitration, in accordance with Section 87 of our Agreement.

The letter names Douglas Taylor, Esq., its counsel at the hearing herein, as its "arbitrator." By letter dated April 2, Lee responded:

> I am in receipt of your letter dated March 29, 2001, seeking to invoke interest arbitration in our current negotiation of a new collective bargaining agreement. As you know, the Company contends that interest arbitration can only be invoked by mutual decision, and that the contract does not empower either party to compel the other to interest arbitration unilaterally. For the reasons we have discussed on several occasions, the Company does not and will not agree to interest arbitration to establish a new contract.
>
> . . . .
>
> Finally, I want to convey in the strongest terms our dismay that the Union is attempting to invoke interest arbitration even before the negotiation process has run its course. The Company is still ready and willing to negotiate a new contract. There are still more than two weeks before our next scheduled bargaining session and over three weeks before the Union has scheduled a membership meeting. We have not yet made anything like a final offer, nor has any offer been presented to the membership. It is deeply disturbing that the Union appears to be pursuing interest arbitration—and has been, since literally our first negotiating session—with such vigor while bargaining is still in process. This concern is frankly magnified by the fact that the Union's "final offer" is so vastly in

[2] Sec. 102 provides that the contract remains in effect until March 31, and unless terminated by either side at least 60 days prior to that date, it continues in effect.

> excess of every settlement reached between the parties in the history of CT TRANSIT.

Lee named himself as HNS' arbitrator. By letter dated April 4, in response to Lee's April 2 letter, Taylor wrote to Lee, inter alia:

> As we have, respectively, been named as the parties' arbitrators under Section 87 of the parties' agreement, it is incumbent on us to attempt to resolve the parties' dispute. However, since a negotiation is scheduled for April 18, there is certainly no need for us to act until that date has passed. This is because the Union will utilize interest arbitration only as a last resort, if all attempts at negotiation have failed. However, unless there is some tangible reason to believe that an agreement will be reached, it would be improper and even negligent for the Union to fail to assert on a timely basis, the right of the members to arbitrate rather than strike.
>
> . . . .
>
> Why did the management team not make a final offer on Wednesday or Thursday, when there would have been time to present the offer to the members before the contract expired? Well, we cannot say . . . The Union refuses to accept the insidious implication that management has placed on the table as its last offer before the contract expires, the worst overall package offered to employees in the past 20 years, while refusing to arbitrate—merely to induce its employees into a strike . . . . Until an impasse has actually occurred, the Union would appreciate a similar understanding on your part.
>
> Meanwhile, the Union bargaining team is, I know, examining its own position soberly—and I trust that management is doing the same and seeking to supplement its planned expenditures for the coming year.

By letter dated April 6, Taylor wrote to Hugh Murray, Esq., counsel for HNS at the hearing herein, inter alia:

> The parties have legal differences which have come to the fore because management was unwilling or unable to give its final offer in contract negotiations and was unwilling to extend the contract for the time necessary to return to the bargaining table. However, there is another bargaining session scheduled and we have every hope that conscientious negotiations will result in an agreement, not an impasse . . . .
>
> Second, I checked further into the language history of what is now Section 87 of the Agreement, without any luck, so far . . . .
>
> Third, we are convinced that the parties' dispute over the applicability/vitality of Section 87 is one, initially, of contract interpretation which belongs in arbitration . . . .
>
> I hope that this letter has been helpful and informative and that we never need to discuss or write about a contract impasse again.

By letter dated April 16, Lee wrote to Taylor, copied to Murray and others, responding to Taylor's April 4 letter and "in order to set the record straight." The letter states, inter alia:

> By mutual agreement, the Company and the Union extended the expiration date of our collective bargaining agreement from March 31, to April 1, 2001, in order for the membership to vote, as it has historically done, on a Sunday. The Company has said since Day 1 of these negotiations that it intended to have a settlement agreement, or at least a final offer, to present to the membership for a vote on April 1.
>
> When the Company came to the bargaining table on Wednesday, March 28, we were shocked when the Union made a "final offer." In effect, the Union outlined what it stated were the minimum acceptable criteria for a settlement. Anything less, you said, would result in the Union recommending that the membership vote no. That was the only time in the history of this Company that the Union has drawn such a "line in the sand" demanding a minimum acceptable package of wage increases and fringe benefit and pension plan improvements. Notably, the Union's minimum acceptable demand significantly exceeded in terms of total cost every settlement in the transit system's history. Also notably, the Union made its "final offer" when the parties still had two and a half days of negotiations scheduled.
>
> I am stunned by your question, "Why did the management team not make a final offer on Wednesday or Thursday, when there would have been time to present the offer to the members before the contract expired?" Since these negotiations began, the Company has made a diligent and good faith effort to negotiate a new agreement. We agreed to extend the expiration date until Sunday, April 1, with the expressed intention of completing negotiations by Friday, March 30. When both parties returned to the table on March 28, it was with the expressed intention of continuing the negotiating process. We stated repeatedly our desire to reach a mutual agreement that the members could ratify on April 1, but also that we would not agree to extend the contract past April 1 and that, if necessary, we intended to give you our best and final offer by Friday, March 30.
>
> The bargaining process came to a screeching halt on Wednesday when the Union made its unprecedented "final offer." Nevertheless, we expressed hope that progress might still be possible and that we could, perhaps, consider a one-year, rather than a multi year, agreement. We were, therefore, further shocked to learn on Thursday that the Union had never scheduled membership meetings on Sunday, April 1. Moreover, you informed us that morning that due to a personal emergency the Union was canceling our Friday meeting.
>
> Doug, as you know full well, the reason we did not make a final offer on Wednesday was because we still had two full days of scheduled negotiations left to go. Just because the Union chose to stifle negotiations by making an intractable final demand, management was nowhere near ready to end the bargaining process with so much time left before the deadline and the parties still far apart on major economic issues. Further, we did not make a final offer on Thursday because, as we discussed specifically during our sidebar meeting with the mediator, we learned the Union never intended to hold a membership meeting on Sunday, April 1 . . . .

> Your letter accuses management of placing on the table "as its last offer before the contract expires the worst overall package offered to the employees in the last 20 years." The last offer you received was, as we made perfectly clear, not the Company's best or final offer. It was precisely the kind of offer you should expect from management when there are still several rounds of bargaining—and nearly two full days of negotiations—left to go. When both parties left the table on Thursday, it was with the mutual understanding that management could not present a final offer before that day's end, that the Union was unavailable to meet the next day, and that it was undesirable for a final offer to fester in the Union's hands for nearly three weeks before a membership meeting. Hence, we agreed to meet at the next available opportunity, April 18, and to schedule membership meetings for Sunday, April 23.

On April 18, HNS gave a seven page "Settlement Agreement" to the Respondents regarding the disputed contact issues. Included was: "Delete Section 87."

On April 27 and April 30, HNS and the Respondents executed a submission agreement in which they submitted "certain specific issues to final and binding arbitration." The agreement states that the Conference Board was invoking interest arbitration under section 87 of the contract, that the Employer does not wish to conduct interest arbitration and claims that it is not obligated to submit to interest arbitration under section 87 "under the present circumstances," but "rather than litigate in another forum whether the parties are obligated to arbitrate the dispute over obligatory interest arbitration, the parties have agreed to submit the matter to arbitration as provided herein." The stated issue is:

> Has the Company violated the expired collective bargaining agreement by refusing to submit to interest arbitration over the terms of a new collective bargaining agreement? If the answer to the above issue is "yes," HNS shall submit to arbitration under Article 87 of the expired collective bargaining agreement without further litigation over the issue. If the answer is "no," CSCB shall not take any legal action designed to force H.N.S. to participate in interest arbitration.

An arbitration hearing was held on June 28. Taylor was the union member of the panel, Murray was the management member, and Dana Eischen was the impartial chairman selected by the parties. At the hearing, Taylor and Murray stated their positions, together with numerous joint exhibits. No witnesses were called at the hearing. The relevant statements by Taylor at this hearing are that "the parties are far apart" in the negotiations (at p. 19). At page 26, Taylor stated: "By this time [April 27], the parties were emphatically at impasse in the sense there had been a final offer which had been rejected by the membership." At page 45, Taylor, referring to section 87, stated: "Management wants to remove the clause from the contract. The Union says no." On August 30, the arbitration panel, with Murray dissenting, found in the Respondent's favor and found that the Employer violated the terms of its contract by refusing to submit to interest arbitration.

On August 24, HNS sent a proposed "Settlement Agreement" to the Respondents in an attempt to settle the contractual dispute. The agreement, six pages, proposes numerous changes to the expired agreement, including the elimination of section 87. On, apparently, the same day, the Union responded that all of the Employer's proposals were acceptable with the exception of eight items, including pensions, COLA, and "Keep Section 87."

On October 5, the Respondents filed a charge with the Board alleging that the Employer violated Section 8(a)(1) and (5) of the Act by insisting during negotiations that section 87 be removed, stating, "The employer's proposal is a permissive subject of bargaining." The Region dismissed this charge on November 21, and the Respondents' appeal of this dismissal was turned down by the General Counsel's office by letter dated February 13, 2002. In a statement of position letter of counsel for the Respondents, dated October 5, responding to the allegations herein, counsel states, inter alia:

> First, while the question of whether a proposal to conduct interest arbitration is a permissive subject of bargaining is settled law under NLRB precedents . . . the Union believes that the question can and should be reconsidered by the Board . . . . [Citation omitted.] Second, to the extent that the parties are at impasse in this case over the question of whether to include an interest arbitration provision in future collective bargaining agreements, that impasse has been caused by the employer, not by the Union."

By letter dated November 15, the arbitrator scheduled a number of dates, commencing March 11, 2002, for the interest arbitration hearing. The Employer made an undated series of proposals for the interest arbitration, including the deletion of section 87. The Respondents also presented its proposals for the interest arbitration, not referring to section 87, and stating that all sections not affected shall continue unchanged. At the hearing, the Employer's representative noted that while its position was that section 87 should be deleted,

> There is an unfair labor practice pending on that issue, and the parties have jointly agreed to put the hearing of that issue aside. There will be no presentation here on that issue until the unfair labor practice issue is resolved. At that point, if it is resolved in favor of the company, there will be no presentation and the unfair labor practice ruling will be controlling. If it's resolved in favor of the union, then this board will hear the issue and determine whether or not an interest arbitration clause will continue in the next succeeding contract.

On July 18, 2002, the board of arbitration issued its arbitration award. The award made adjustment to wages and cost-of-living provisions, the pension plan, and other of the employees' terms and conditions of employment. Pursuant to the agreement of the parties, it made no decision on the continued applicability of section 87, pending a Board decision in this matter. After the receipt of this award, the Unions and the Employer attempted to put it into a written agreement; however, problems arose over how to word section 87. There was a series of e-mails between the parties, principally Lee and Douglas in August. On August 12, Lee wrote that the contract should specifically note what the panel had decided: that it was reserving action on section 87 pending a Board decision on the Em-

ployer's unfair labor practice charge and complaint. On August 13, Douglas responded, inter alia, "On the other point, however, we must insist. Section 87 must stay in the text as written." On August 14, Lee wrote Douglas asking why it was not a reasonable compromise to let section 87 "stay in the text as written" with a note stating that its continuation in the contract was the subject of pending litigation. He suggested the following contract language: "The Board of arbitration has retained jurisdiction concerning the inclusion of this section in the contract, pending the outcome of pending litigation." Douglas responded later that morning: "It's not reasonable because section 87 was not amended and there should be no implication that it has been amended. On the contrary, the Board [the Arbitration panel] specifically agreed not to amend it." He recommended, instead, "that we might append to the end of the contract that sentence or two from the award which retains jurisdiction." On the following morning, Lee responded that Douglas' suggestion was not acceptable, and no written agreement was agreed upon.

IV. ANALYSIS

There can no longer be any doubt that interest arbitration is a permissive subject of bargaining and, therefore, a party cannot insist upon it in negotiations to the point of impasse. *Sheet Metal Workers Local 38*, 231 NLRB 699 (1977); *Sheet Metal Workers Local 20 (George Kach Sons)*, 306 NLRB 834, 839 (1992); *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161, 1163 (5th Cir. 1976). In addition, Board law precludes a party from using an existing interest arbitration clause to perpetuate that clause. In *Columbus Printing*, supra, the court stated:

> There are several important reasons why a new contract arbitration clause should not be enforceable to perpetuate inclusion of the clause in successive bargaining agreements. The contract arbitration system could be self-perpetuating: a party having once agreed to the provision, may find itself locked into that procedure for as long as the bargaining relationship endures. Exertion of economic force to rid oneself of the clause is foreclosed, for the continued inclusion of the term is for resolution by an outsider. Parties may justly fear that the tendency of arbitrators would be to continue including the clause, for that is exactly what happened in this case.

As a party cannot bargain to impasse on a nonmandatory subject of bargaining such as section 87 herein, the initial issue herein is whether there was an impasse in negotiations between the parties. An impasse is most often defined as the point in negotiations when the parties are warranted in assuming that further bargaining would be futile. *GATX Logistics, Inc.*, 325 NLRB 413, 418 (1997); and *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995). In *CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996), the judge stated:

> A genuine impasse in negotiations is synonymous with deadlock. Where there is a genuine impasse, the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

I find that the evidence supporting impasse herein is compelling. Although section 87 does not refer to impasse or a similar term, the usual presumption is that a party invoking interest arbitration considers that further negotiations would be futile, and that appears to be the case herein. On March 29, Douglas wrote to Lee that ". . . we have been unable to resolve our differences over certain changes proposed by both sides . . . ." In addition, at the arbitration hearing on June 28, Taylor told the panel: "By this time [April 27] the parties were emphatically at impasse in the sense there had been a final offer which had been rejected by the membership." Although the parties had failed to reach agreement on a number of issues, section 87 was clearly the subject that was deadlocking them. From February 20 through the present time, the Employer proposed eliminating section 87, and the Unions rejected that proposal outright. There were no negotiations, nor has there been any movement, on that issue. As Taylor stated in his presentation to the panel on June 28: "Management wants to remove the clause from the contract. The Union says no." In addition, in a position letter to the Region dated October 5, counsel admitted that there was an impasse over whether to include an interest arbitration provision in the next contract, but blamed the Employer for the impasse. Counsel for the Respondents, in its brief, argues that even if there was an impasse, it was not caused by the Unions' demand that section 87 remain in the agreement, but was caused by the Employer's insistence that the section be deleted from the contract. In *Sheet Metal Workers Local 38*, supra, the Board, in finding a violation of Section 8(b)(3) of the Act, discussed nonmandatory subjects of bargaining and stated: "no party may insist upon its inclusion in the bargaining agreement to the point of impasse." The essence of this is that the insistence to impasse upon the inclusion of a permissive subject violates the Act. On the other hand, the Employer was lawfully entitled to demand the exclusion of this nonmandatory subject. This defense is therefore rejected.

As stated above, the Board does not allow a party in negotiations to use an existing interest arbitration clause to perpetuate that clause. That is what the Respondents attempted to do in the negotiations herein. The Respondents invoked an arbitration proceeding in order to force the Employer to arbitrate the provisions of a new collective-bargaining agreement. When the arbitration panel found in the Respondents' favor, the parties each then submitted their proposals to the panel for determination. Although the Respondents' proposals did not specifically include section 87, the preamble to its proposals states: "All sections and subsections not affected by these proposals are to continue unchanged." The Respondents were therefore proposing that section 87 be preserved in the next contract. The Employer's proposal requested that section 87 be deleted. It was only because of the pending Board complaint herein that the Respondents agreed with the Employer to hold the section 87 issue in abeyance pending a Board decision herein. Further evidence of the Respondents' insistence on continuing section 87 into the new contract is the Respondent's reluctance to compromise on this issue in preparing a written contract containing the panel's findings. Douglas would not even agree to language that the panel was reserving action on it pending a Board decision, stating: "Section 87 must stay in the text as written."

For these reasons, I find that by insisting on retaining section 87 in negotiations up to the point of impasse, and by insisting that any new collective-bargaining agreement also contain an interest arbitration provision, the Respondents violated Section 8(b)(3) of the Act.

CONCLUSIONS OF LAW

1. The Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Conference Board, Local 425, Local 443, and Local 281 have each been labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents insisted that the Employer agree to an interest arbitration clause as a condition of reaching a new agreement, and bargained to impasse in support of that demand, in violation of Section 8(b)(3) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(b)(3) of the Act, I recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. In that regard, the Respondents shall notify the Employer, in writing, that it is withdrawing its insistence that any new collective-bargaining agreement contain an interest arbitration provision, and that it will sign a contract setting forth the terms found by the arbitration panel in its award dated July 18, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondents, Connecticut State Conference Board, Amalgamated Transit Union, Amalgamated Transit Union Local 425, Amalgamated Transit Union Local 443, and Amalgamated Transit Union Local 281, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Employer by insisting to impasse that the Employer agree to include an interest arbitration provision in any new collective-bargaining agreement.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify H.N.S. Management Company, Inc. and First Transit, Inc. that the Unions are willing to sign a collective-bargaining agreement pursuant to the terms contained in the interest arbitration award dated July 18, 2002, but without an interest arbitration clause.

(b) Within 14 days after service by the Region, post at its union offices in East Hartford, Stamford, and New Haven, Connecticut, copies of the attached notice marked "Appendix A through Appendix D."[4] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."